UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTOPHER HUDSON, in his individual capacity on behalf of himself and others similarly situated, Plaintiff, v. NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL, *et al*., Defendants.	)	No. 1:18-cv-4483-RWS

REPLY MEMORANDUM IN SUPPORT OF THE BOARD DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Hudson would like this Court to believe a Taft-Hartley Board committed violations of ERISA's notice requirements so egregious they require the removal of the Board, the imposition of personal liability on each of its members, and the resurrection of an untold number of prior disability decisions. It is all an illusion. Hudson invented these allegations as an end-run around the Board's decisions on his disability applications. His claims are speculative; they defy common sense and experience; and they are unsustainable as a matter of law.

ARGUMENT & AUTHORITIES

I. Counts I and II Fail Because Hudson Was Not Affected By Any Alleged Omission In The SPD.

Hudson suggests this Court must accept whatever he wishes to plead as fact. That is not the law. His claims must be plausible, not speculative. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Drawing on experience and common sense, this Court should reject Counts I and II as implausible. As noted in the Board Defendants' opening brief, these two counts defy common sense because they propose that an injured, unemployed Player would delay filing for disability benefits for years because some future medical advance just might link his specific impairments to NFL football. Bd. Defs.' Mot. at 2. Hudson does not seriously challenge this argument. He now claims a "reasonable inference" of his allegations "is that the players would have done things differently, *i.e.*, get a diagnosis and seek counsel." Pl.'s Opp. at 12. This claim is no better for Hudson. When Hudson applied for T&P benefits, he ***had counsel***; he ***got a diagnosis***; and he ***tried to link his impairments to NFL football*** activities.

There is no plausible connection between the SPD and Hudson's claimed harm, *i.e.*, the increased benefits he seeks. Hudson concedes he would have done nothing different. He never

claims he read the SPD or relied on it. These failures doom Counts I and II under Second Circuit law because, even if the SPD were deficient (and it was not), ERISA does not impose liability for innocent omissions that never impacted a participant. *See Wilkins v. Mason Tenders Dist. Council Pension Fund*, 445 F.3d 572, 585 (2d Cir. 2006) ("A deficient SPD does not by itself mean that Wilkins prevails; to recover in this Circuit, a plaintiff must demonstrate likely prejudice resulting from a deficient SPD.") (internal citation and quotation marks omitted).

II. Count I Fails Both Because The SPD Complied With ERISA Section 102, And Because It Is Time-Barred.

A. Hudson does not meaningfully challenge the point that the SPD reasonably apprised Players that a higher standard applied to reclassification requests.

Section 102 of ERISA provides in part that an SPD shall "***reasonably apprise*** such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a) (emphasis added). In Count I, Hudson alleges that the SPD violated section 102 because it failed to reasonably apprise Players that a higher standard applied to requests for reclassification. Compl. ¶¶ 5, 80. The Board's opening brief noted that this allegation is implausible because the SPD juxtaposes the Plan's standards for initial classification decisions against the separate, reclassification standard, and in doing so reasonably informs Players that a higher standard applies. Bd. Defs.' Mot. at 14-15. The SPD describes the reclassification rules in a different section, and stated that requests for reclassification must present "clear and convincing" evidence of "changed circumstances."

Hudson does not respond to, and therefore arguably concedes, this point. *In re Refco Inc. Secs. Litig.*, 826 F. Supp. 2d 478, 511 (S.D.N.Y. 2011) ("Plaintiffs do not respond to [Defendant's] argument … and therefore have conceded the point."). Indeed, other than the conclusory allegation that the SPD contained indecipherable legalese, the Complaint never

alleges that Hudson had any understanding of the disputed provisions at all, much less that Hudson did not understand that reclassification requests were subject to a higher standard.

Hudson focuses instead on the Board's separate argument that neither ERISA nor any case interpreting it requires a plan administrator to include discretionary interpretations of plan terms in an SPD. Pointing to *Wilkins*, he argues that the Second Circuit has squarely rejected that argument. Pl.'s Opp. at 17. But in *Wilkins*, the Second Circuit confronted an undisclosed policy that required participants to safeguard and later produce specific types of documents to prove their entitlement to plan benefits not received as a result of an employer's alleged underreporting of earnings—a "persistent and acknowledged problem." 445 F.3d at 574, 584. *Wilkins* did not address whether an SPD must include a plan administrator's discretionary interpretation of plan terms. In *Wilkins*, "no provision of the SPD even arguably g[ave] notice of the Policy." *Id.* at 582. Here, there is apparently no dispute that the Plan's SPD at least notified Players that reclassification requests were subject to a different, higher standard. *See McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 192-93 (2d Cir. 2007) (rejecting plaintiff's reliance on *Wilkins* and finding that SPD reasonably apprised plan participants and beneficiaries of their rights, explaining that "[i]t did so by apprising participants and beneficiaries of the deferred vested retirement benefit in general and by specifically distinguishing that benefit from the early retirement benefit."). Thus, Hudson has not pointed to a single, analogous case supporting the theory of liability stated in Count I.

B. The applicable three-year limitations period bars Hudson's section 102 claim.

Hudson's complaint, his concessions in this case, and public documents prove that Hudson knew or should have known prior to May 21, 2015 that "changed circumstances" required more than new evidence about the original impairments. First, Hudson does not seriously dispute that the structure and content of the existing SPD should have notified him that

a reclassification request would be subject to a higher standard, compared to an initial application for benefits. Second, in October 2014, the Committee rejected Hudson's argument that he met the "changed circumstances" requirement after he came forward with new evidence about the same impairments that led to his initial award. Compl. ¶¶ 35-36. Third, Hudson was represented by counsel during the administrative process, and a modicum of due diligence would have alerted Hudson to the 2011 *Boyd* decision, a reported case in which the Board explained—and a federal court upheld—its interpretation of "changed circumstances." Each of these three facts contradict Hudson's argument that he did not have the predicate information for his section 102 claim prior to seeing the Board's final decision letter on his claim on May 21, 2015. Together, they make clear that Hudson had or should have had notice more than three years before this complaint was filed.

Hudson's argument that a six-year limitations period applies, Pl.'s Opp. at 22-23, is incorrect. Under CPLR section 214, a three-year statute of limitations applies to any "action to recover upon a liability… created or imposed by statute." Consequently, a three-year limitations period controls Hudson's section 102 claim, which alleges a violation of the statutory requirements for SPDs. *See Brown v. Rawlings Fin. Servs., LLC*, 868 F.3d 126, 128 (2d Cir. 2017) (Where "[t]he question is which [statute of limitations] is 'most analogous' to a claim under [ERISA]… we consider some characteristic features of [the ERISA claim]."); *Osberg v. Foot Locker, Inc.*, 907 F. Supp. 2d 527, 533 (S.D.N.Y. 2012) (internal citation omitted) ("*Amara* has now clarified that an SPD is not a contract—its terms are not subject to enforcement. Therefore, the appropriate limitations period is the three year period governing statutory violations."), *aff'd in part and vacated in part*, 555 Fed. App'x 77 (2d Cir. 2014); *Caufield v. Colgate-Palmolive Co.*, No. 16-cv-4170, 2017 WL 744600, at *5 (S.D.N.Y. Feb. 24, 2017)

("ERISA does not prescribe a statute of limitations for disclosure claims under § 102…. [I]n this situation courts apply the most similar state statute of limitations…. The New York statute of limitations applicable to Plaintiffs' disclosure claims is the three-year period governing statutory violations.").

III. Count II Does Not Adequately Plead A Breach-Of-Fiduciary-Duty Claim Based On A Misrepresentation Or An Omission, And It Is Untimely.

A. The Complaint does not contain facts essential to a plausible breach-of-fiduciary-duty claim.

To save Count II, Hudson argues that unintentional misrepresentations and omissions can support a breach-of-fiduciary-claim. Pl.'s Opp. at 25. However, "[t]o establish a breach of fiduciary duty based on *un*intentional misrepresentations, [a plaintiff] must satisfy the more restrictive standard that [the Second Circuit] recognized in *Estate of Becker*," where the court held that a fiduciary breaches its duties "if their agent inadvertently misleads participants about a benefits question on which the summary plan description, too, is unclear." *In re DeRogatis*, 904 F.3d 174, 194 (2d Cir. 2018) (emphasis in original). *See Estate of Becker v. Eastman Kodak Co.*, 120 F.3d 5, 10 (2d Cir. 1997) (a fiduciary responding to a benefits question cannot provide a materially misleading response that further exacerbates a lack of clarity). The Complaint here contains no allegation that the Board or its agents unintentionally (or intentionally) misrepresented the terms of the Plan to Hudson. This is an omission case, not a misrepresentation case.

Hudson's reliance on omissions case law is equally misplaced. A breach-of-fiduciary-duty claim based on an omission can exist only when the fiduciary operates from a position of superior knowledge, and it knows that its failure to disclose certain information will harm participants. *See, e.g., Osberg v. Foot Locker, Inc.*, 138 F. Supp. 3d 517, 552 (S.D.N.Y. 2015) (quoting *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 88 (2d Cir. 2001)) (breach

occurs where a fiduciary "'affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm.'"), *aff'd*, 862 F.3d 198 (2d Cir. 2017); *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 292 (2d Cir. 2006) (explaining that a duty to disclose arises where, among other things, a party "possesses superior knowledge, not readily available to the other"). The Complaint does not plausibly allege that the Board could foresee medical or scientific advances, or that it knew that its failure to further explain or illustrate the reclassification provision in the SPD would deprive Hudson or any other Player of the benefit of those advances.

While certain conduct may violate both section 102 and section 404 of ERISA—*i.e.*, egregious attempts to knowingly hide material information from plan participants[1]—Hudson has not alleged that type of conduct here. His section 404 claim is identical to his section 102 claim, Compl. ¶ 87, and it fails because a technical violation of section 102 does not *ipso facto* constitute a breach of fiduciary duty. *See Weiss v. CIGNA Healthcare, Inc.*, 972 F. Supp. 748, 754 (S.D.N.Y. 1997) (citation omitted) ("[I]t would be 'inappropriate to infer an unlimited disclosure obligation on the basis of general provisions that say nothing' about such duties.").

B. ERISA's six-year statute of repose bars Count II.

ERISA section 413 is a statute of repose. It bars any claim brought more than six years after "(A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." 29 U.S.C. § 1113(1). Hudson alleges the Board breached its duty to him by not revealing its interpretation of the reclassification provision prior to his initial application for benefits, and he became "locked in" to a lower level when he was awarded benefits. Compl. ¶¶

[1] *See, e.g.*, *Osberg,* 138 F. Supp. 3d at 555.

5, 80, 84, 88. He was awarded benefits on May 20, 2011, seven years and one day before he filed suit. Compl. ¶¶ 33-34. Because the opportunity to cure the alleged breach passed more than six years before he filed suit, the breach-of-fiduciary-duty claim is time barred.

To avoid having pled himself out of court, Hudson first says section 413's "cure" provision makes Count II timely. Pl.'s Opp. at 32-33. But courts "that have looked at this issue have held that the 'last opportunity to cure' an omission is the 'last date on which Defendant could have averted Plaintiff's detrimental reliance on the incomplete information.'" *Moyle v. Liberty Mut. Ret. Benefit Plan*, No. 10-cv-2179, 2016 WL 7242021, at *13 (S.D. Cal. Dec. 15, 2016) (citation omitted).[2] Under Hudson's theory that he was "locked in" by the Board's May 2011 decision to award him benefits, any detrimental reliance on the SPD could no longer be averted after that decision, and his Complaint brought more than 6 years later is untimely.

Hudson's attempt to invoke the fraud or concealment exception to Section 413, Pl.'s Opp. at 30-32, is also meritless. The Complaint does not allege the Board attempted to conceal its supposed breach from Hudson. *See Osberg*, 862 F.3d at 210-11 (internal quotation marks omitted, alteration in original) (quoting *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 189 (2d Cir. 2001)) ("As we noted in *Caputo*, application of the concealment exception requires that in addition to alleging a breach of fiduciary duty (be it fraud or any other act or omission), the plaintiff ... also allege that the defendant committed either: (1) a self-concealing act—an act committed during the course of the breach that has the effect of concealing the breach from the plaintiff; or (2) active concealment—an act distinct from and subsequent to the breach intended to conceal it."); *Caputo*, 267 F.3d at 191 (explaining that to get the advantage of the fraud and concealment exception, "the plaintiffs must plead fraud with the requisite particularity"). This case does not

[2] The term "cure," as used in ERISA § 413, means "to fix," rather than "to find a remedy." *See Olivo v. Elky*, 646 F. Supp. 2d 95, 102 (D.D.C. 2009).

involve a bid-rigging scheme that is designed to be concealed. *See, e.g.*, *State of N.Y. v. Hendrickson Bros., Inc*., 840 F.2d 1065, 1083 (2d Cir. 1988) (cited in Pl.'s Opp. at 31). It involves a publicly available plan document produced through collective bargaining; an SPD disseminated to hundreds of plan participants; and a plan interpretation that was disclosed to claimants who sought reclassification and litigated in federal court.

Finally, Hudson claims that the statute of limitations was extended by the Board's continuing breach. Pl.'s Opp. at 33. But the alleged breach as to Hudson himself was not continuing. The Complaint states the alleged breach occurred when Hudson was "locked in" by the original award of benefits, and therefore became subject to the reclassification standard. The original award was on May 20, 2011. Hudson filed suit May 21, 2018, seven years and a day later. His fiduciary breach claims are barred by ERISA's six-year statute of repose.

IV. Count IV Fails Because Hudson Lacks Standing.

This case is about the Bert Bell/Pete Rozelle NFL Player *Retirement* Plan. The Retirement Plan pays Hudson's benefits; the administrator of the Retirement Plan decided his original application and his reclassification request; and Hudson's allegations turn on the terms of the Retirement Plan and its SPD. *See* Compl. ¶ 21 ("The relevant written instrument of the Plan … is the Bert Bell/Pete Rozelle NFL Player Retirement Plan.… Even though there is a separate plan … [t]he Bert Bell/Pete Rozelle NFL Player Retirement Plan is the Plan that governs Plaintiff's disability benefits.").

The NFL Player Disability & Neurocognitive Benefit Plan is a different plan. It has nothing to do with Hudson. The amendment at the center of Count IV applies solely to claims for disability benefits under the Disability Plan filed **after** the end date of Hudson's claimed class. Neither Hudson nor his class is affected by the amendment. Thus, Hudson has no

standing to complain about anything having to do with it. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

While Hudson takes the position that he "does not need to show actual harm to have Article III standing" because he seeks only "injunctive and related declaratory relief," Pl.'s Opp. at 45, actual harm is a prerequisite to standing. *Lujan*, 504 U.S. at 560 ("[P]laintiff must have suffered an 'injury in fact' . . . [which is] 'actual or imminent, not 'conjectural' or 'hypothetical[.]'"") (citations omitted). As Hudson's own authorities explain, he "cannot claim that either an alleged breach of fiduciary duty to comply with ERISA, or a deprivation of [his] entitlement to that fiduciary duty, in and of themselves constitutes an injury-in-fact sufficient for constitutional standing." *Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (cited in Pl.'s Opp. at 44) (rejecting argument that plaintiff has standing to sue for alleged fiduciary breach under ERISA absent "some injury or deprivation of a specific right that arose from a violation of that duty").

If Hudson intends Count IV to block the bargaining parties from amending the terms of a disability plan, he is squarely contradicted by federal law. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) ("ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate [such benefits].").

V. Count V Is Barred For The Reasons Stated In The Board's Opening Brief.

In Count V, Hudson attempts to void the Plan's limitations provision on the theory that the provision and the SPD describing it constitute breaches of sections 102, 404, and 410 of ERISA. Hudson incorrectly argues that "[n]one of the Defendants challenge" that Count V states a claim. Pl.'s Opp. at 48. The Board made that challenge, which is reiterated here. *See*

Board Defs.' Mot. at 23-25 (arguing that Count V fails to state a claim because (i) the limitations provision incorporates ERISA section 413, and (ii) a limitations provision does not attempt to relieve fiduciaries of liability).

Notably, Hudson relegates his response to the Board's statute-of-limitations argument to a footnote. Pl.'s Opp. at 52, n.36. The Complaint acknowledges that the Plan and SPD have contained the same provisions since 2009 and 2010, respectively. Hudson therefore had sufficient information—in fact, he had the very same information about the Plan and the SPD—for nearly a decade prior to filing suit in May 2018. Count V is untimely as a matter of law.

CONCLUSION

For these reasons, and for the reasons in the Board's opening brief, the Court should grant the Board's motion and dismiss Hudson's Complaint with prejudice.

Dated: November 30, 2018

Respectfully submitted,

Michael L. Junk, *pro hac vice*
Michael J. Prame (MP-4172)
Groom Law Group, Chartered
1701 Pennsylvania Ave. NW
Washington, DC 20006
Tel: (202) 857-0620
Fax: (202) 659-4503
Email: mjunk@groom.com
Email: mjp@groom.com

Brian Laurence Bank (BB-5995)
Jacqueline Mecchella Bushwack (JB-0306)
Rivkin Radler, LLP
926 RXR Plaza, West Tower
Uniondale, NY 11556
Tel: (516) 357-3000
Fax: (516) 357-3333
Email: brian.bank@rivkin.com
Email: jacqueline.bushwack@rivkin.com

COUNSEL FOR DEFENDANTS
THE RETIREMENT BOARD OF THE BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN, KATHERINE "KATIE" BLACKBURN, RICHARD "DICK" CASS, TED PHILLIPS, SAMUEL MCCULLUM, ROBERT SMITH, AND JEFFREY VAN NOTE